(3)

Supreme Court, U.S.
FILED
FEB 22 2000
CLERK

No. 99-1048

# In the Supreme Court of the United States

KANSAS STATE UNIVERSITY,
*Petitioner*,

v.

MARK AND GENEVIEVE INNES,
*Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

## *AMICUS CURIAE* BRIEF OF TEXAS, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, ILLINOIS, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, AND WYOMING IN SUPPORT OF PETITIONERS

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

LINDA S. EADS
Deputy Attorney General

GREGORY S. COLEMAN
Solicitor General*

RONALD R. DEL VENTO
Chief, Bankruptcy & Collections Division

MARK BROWNING
Assistant Attorney General

P. O. Box 12548
Austin, Texas 78711-2548
[Tel] (512) 936-1700
[Fax] (512) 474-1700

* *Counsel of Record*

26pp

BILL PRYOR
Attorney General of Alabama

BRUCE M. BOTELHO
Attorney General of Alaska

MARK PRYOR
Attorney General of Arkansas

BILL LOCKYER
Attorney General of California

M. JANE BRADY
Attorney General of Delaware

ROBERT A. BUTTERWORTH
Attorney General of Florida

JAMES E. RYAN
Attorney General of Illinois

RICHARD P. IEYOUB
Attorney General of Louisiana

JENNIFER M. GRANHOLM
Attorney General of Michigan

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JOSEPH P. MAZUREK
Attorney General of Montana

DON STENBERG
Attorney General of Nebraska

FRANKIE SUE DEL PAPA
Attorney General of Nevada

JOHN F. FARMER, JR.
Attorney General of New Jersey

HEIDI HEITKAMP
Attorney General of North Dakota

W. A. DREW EDMONDSON
Attorney General of Oklahoma

CHARLIE CONDON
Attorney General of South Carolina

MARK BARNETT
Attorney General of South Dakota

PAUL G. SUMMERS
Attorney General and Reporter of Tennessee

JAN GRAHAM
Attorney General of Utah

WILLIAM H. SORRELL
Attorney General of Vermont

CHRISTINE O. GREGOIRE
Attorney General of Washington

GAY WOODHOUSE
Attorney General of Wyoming

## TABLE OF CONTENTS

Interest of Amici Curiae ..... 1

Summary of Argument ..... 2

Argument ..... 3

I. Congress May Not Require an Implicit Waiver of Eleventh Amendment Immunity Under the Spending Clause Without Clear Notice of Its Intent. ..... 3

II. The Statute Governing the Perkins Student Loan Program Is Silent with Respect to Any Waiver of Eleventh Amendment Immunity by States Participating in the Program. ..... 4

III. The Tenth Circuit's Faulty Analysis Creates the Potential for Broad Misapplication in Many Important Areas of Federal-State Relations. ..... 8

Conclusion ..... 19

## TABLE OF AUTHORITIES

**Cases:**

*Alden v. Maine*, 119 S.Ct. 2240 (1999) ..... 3, 12,18
*Amos v. Maryland Dep't of Public Safety and Correctional Services*, 178 F.3d 212 (CA4 1999) ..... 10
*Amos v. Maryland*, 126 F.3d 589 (CA4 1997) ..... 10
*Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) ..... 4
*Brown v. Felsen*, 442 U.S. 127 (1979) ..... 6
*Burnette v. Carothers*, 192 F.3d 52, 57 (CA2 1999) .. 18
*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219 (1999) ..... 1, 11
*Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661 (1999) ..... 4, 9, 10, 16
*DeKalb County v. Platter (In re Platter)*, 140 F.3d 676 (CA7 1998) ..... 13
*Florida Dep't of Health & Rehabilitation Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) ..... 14
*Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985) ..... 11, 19
*Gardner v. New Jersey*, 329 U.S. 565 (1947) ..... 13
*Georgia Department of Revenue v. Burke (In re Burke)*,146 F.3d 1313 (CA11. 1998) ..... 12
*Gregory v. Ashcroft*, 501 U.S. 452 (1985) ..... 11
*Litman v. George Mason University*, 186 F.3d 544, 553 (CA4 1999) ..... 9
*Macy v. Macy*, 714 P.2d 744 (Wyo. 1986) ..... 7

*Massachusetts Higher Educ. Assistance Corp. v. Taylor*, 459 N.E.2d 807 (Mass. 1984) ..... 7, 16
*Mills v. Maine*, 118 F.3d 37 (CA1 1997) ..... 18
*Muir v. Sallie Mae Servicing Corp. (In re Muir)*, 239 B.R. 213 (Bankr. D. Mont. 1999) ..... 14
*New York State Higher Educ. Services Corp. v. Kaplan*, 684 N.Y.S.2d 356 (N.Y. App. Div. 1999) ..... 7, 16
*New York State Higher Educ. Services Corp. v. Kaplan*, 684 N.Y.S.2d 356 (N.Y. App. Div. 1999) ..... 7
*Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) ..... 3, 17
*Pennsylvania Dep't of Corrections v. Yeskey*, 254 U.S. 206 (1998) ..... 10
*Sandoval v. Hagan*, 197 F.3d 484 (CA11 1999) ..... 9
*Schatz v. Franchise Tax Board*, 81 Cal. Rptr. 2d 719 (Cal. App. 1999) ..... 7
*Seminole Tribe v. Florida*, 517 U.S. 44 (1996) ..... 18
*Snyder v. Nebraska*, 228 B.R. 712 (Bankr. D. Neb. 1998) ..... 14
*South Dakota v. Dole*, 483 U.S. 208 (1987) ..... 3
*Stepp v. Stepp*, 955 P.2d 722 (Okla. 1998) ..... 7
*Tucker v. Louisiana Dep't of Revenue & Taxation*, 708 So. 2d 782 (La. App. 1998) ..... 7
*United States v. Mottolo*, 605 F. Supp. 898 (D. N.H. 1985) ..... 14
*Vermont Student Assistance Corp. v. Zeichner*, 708 A.2d 1351 (Vt. 1998) ..... 7, 16
*Virginia Department of Education v. Riley*, 106 F.3d 559 (CA4 1997) ..... 10
*Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) ..... 4

*Wilson-Jones v. Caviness*, 99 F.3d 203 (CA6 1996) .. 18
*Wyoming v. Straight (In re Straight)*, 143 F.3d 1387 (CA10 1998) ..... 12

**Statutes**:

42 U.S.C. §4601 *et seq*.. ..... 18
11 U.S.C. §362(a) ..... 16
11 U.S.C. §362(c) ..... 16
11 U.S.C. §362(d) ..... 16
11 U.S.C. §523(a) ..... 7
11 U.S.C. §523(a)(8) ..... 6
20 U.S.C. §1087aa *et seq* ..... 4
20 U.S.C. §1092(e) ..... 5
20 U.S.C. §1092(f) ..... 5
20 U.S.C. §1094(a)(14) ..... 5
20 U.S.C. §1094(a)(23) ..... 5
20 U.S.C. §1094(c) ..... 6
20 U.S.C. §§1087hh ..... 5
28 U.S.C. §1334(b) ..... 6
28 U.S.C. §1094(c)(3)(B) ..... 15
34 C.F.R. §674.49 ..... 16

**Rules**:

Fed. R. Civ. P.12(b) ..... 17

No. 99-1048

# In the Supreme Court of the United States

---

KANSAS STATE UNIVERSITY,
*Petitioner*,

v.

MARK AND GENEVIEVE INNES,
*Respondents*.

---

Amicus Curiae Brief of Texas, *et al.*,
In Support of Petition for Writ of Certiorari

---

## INTEREST OF AMICI CURIAE

The Perkins student loan program provides loans to students in every state through universities and colleges, including many state-affiliated institutions. All states will be affected if participation in the Perkins loan program results in waiver of the states' Eleventh Amendment immunity from suit in federal court. Beyond the immediate context of federally subsidized student loan programs, the prospect of a federal executive branch agency effectuating a waiver of the states' Eleventh Amendment immunity by regulation or contract, without express congressional authorization, creates substantial concerns for all states, which participate in numerous federally-subsidized programs in a variety of areas. *Amici* therefore have a vital interest in the outcome of this case.

## SUMMARY OF ARGUMENT

This case asks whether federal agencies, in the absence of any congressional authorization, may promulgate regulations or draft contracts that require state institutions to waive their Eleventh Amendment immunity. The statute authorizing the Perkins loan program does not authorize or require waiver of Eleventh Amendment immunity. Nor does the statute suggest that states may be sued in federal court for non-compliance with any Department of Education regulation or contract under the program.

The Tenth Circuit, in holding that KSU waived its immunity, failed to recognize that there is no federal statutory provision that could form the basis for a waiver under the Spending Clause. The court of appeals also misconstrued relevant DOE regulations, none of which require state institutions administering Perkins loan funds to litigate suits in bankruptcy court in cases where no proof of claim is filed. State courts have concurrent jurisdiction over such suits, and state institutions on a number of occasions have exercised their option to proceed in state court. Nothing in the DOE regulations or contracts prohibits such a procedure, and the regulations therefore do not unambiguously require state institutions to litigate in federal court.

The "waiver by regulation or contract" approach adopted by the Tenth Circuit could open a floodgate of induced Eleventh Amendment waivers under the Spending Clause without Congress even attempting to authorize those waivers. The court of appeals erred in broadly construing the waiver doctrine, and the Court should grant the petition in this case to resolve that issue.

## ARGUMENT

### I. CONGRESS MAY NOT REQUIRE AN IMPLICIT WAIVER OF ELEVENTH AMENDMENT IMMUNITY UNDER THE SPENDING CLAUSE WITHOUT CLEAR NOTICE OF ITS INTENT.

The Court's recent Eleventh Amendment cases raise, without deciding, the issue of the extent to which Congress may use its Spending Clause power to induce states to waive their Eleventh Amendment immunity. *Alden v. Maine*, 119 S.Ct. 2240, 2267 (1999) ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits. *Cf. South Dakota v. Dole*, 483 U.S. 208 (1987)."); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219, 2231 (1999) ("[W]e have held in such cases as [*Dole*] that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take . . . ."). When Congress has not spoken clearly (or at all) with regard to Eleventh Amendment immunity waiver, however, *amici* believe that agencies may not use regulations or contracts to require states to waive their immunity.

In considering, in a variety of contexts, whether Congress has successfully abrogated states' Eleventh Amendment immunity, the Court has repeatedly set forth a strict standard that must be met by any statute. Congress must, in the statute, evidence its intent to abrogate immunity and "must do so unambiguously ... enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). The

mere receipt of federal funds cannot establish that a state has consented to suit in federal court. Instead, a federal *statute* must "evince an unmistakable congressional purpose" to effectuate the waiver, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246-47 (1985), and "Congress [must] speak with a clear voice" when it does so. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 1670 (1999); *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

Although additional issues are presented by KSU's petition,[1] *amici*'s primary focus is whether, as the court of appeals decided, an executive agency regulation or contract may require an Eleventh Amendment waiver in the absence of any congressional authorization. Whether "waiver by regulation" or "waiver by contract" can supplant "clear Congressional statement in a statute" is an important issue worthy of the Court's attention.

## II. THE STATUTE GOVERNING THE PERKINS STUDENT LOAN PROGRAM IS SILENT WITH RESPECT TO ANY WAIVER OF ELEVENTH AMENDMENT IMMUNITY BY STATES PARTICIPATING IN THE PROGRAM.

Congress created "Federal Perkins Loans" to provide low-interest loans for needy students at institutions of higher education. *See* 20 U.S.C. §1087aa *et seq*. But the statute authorizing Federal Perkins Loans contains not the slightest hint that a state institution choosing to participate in the program will thereby waive (or be required to waive) its

---

1. Also presented in the case is the issue of the degree of specificity required in a state statute or state constitutional provision to authorize lower-level state employees to waive a state's immunity.

immunity in federal court in suits relating to loan collection or discharge.

The Federal Perkins Loan statute contains some explicit, and quite detailed, requirements for participating institutions, including state schools. Congress clearly knew how to, and did, condition appropriation of Perkins Loan funds on institutions agreeing to do certain things deemed important by Congress. Participating state institutions must maintain extensive, daily records of campus crime statistics and make such information available to the public and the Secretary of Education. 20 U.S.C. §1092(f). Participating institutions in certain states must distribute voter registration forms to students. §1094(a)(23). They must report annually on students receiving athletically related student aid. §1092(e).

The statutory list of requirements is long and elaborate, but the statute contains no hint, much less a "clear statement," of an "unambiguous congressional purpose" that states surrender their Eleventh Amendment immunity to participate in the program. The statute does contain, as do many large federal programs funded under the Spending Clause, a general authorization for the Department of Education to promulgate implementing regulations and to enter into contracts or other agreements with state agencies or participating institutions of higher learning. *See* §§1087hh, 1094. There is also a statutory requirement that participating institutions develop Default Management Plans with respect to defaulted loans and that the plans be approved by the DOE. *See* §1094(a)(14).

The statute does not contain any congressional directive concerning where suits to collected defaulted loans are to be maintained, and the statute makes no reference

whatsoever to the proper court in which states should defend suits seeking to discharge student loan obligations. To the extent the statute speaks to the potential liability of state institutions for noncompliance with Perkins Loan Program requirements, it does so only by providing for civil penalties and administrative hearings in the DOE. §1094(c). The statute does not, however, contain a specific grant of jurisdiction to federal courts to hear disputes involving Perkins loans; nor does it purport either to abrogate immunity or to authorize the agency to require waivers of immunity.

The Bankruptcy Code is similarly devoid of any provision limiting litigation over student loans to the federal court system. Dischargeability disputes[2] are civil proceedings arising under or related to cases under Title 11, and therefore are matters within the concurrent jurisdiction of federal and state courts, not the exclusive jurisdiction of federal district and bankruptcy courts. 28 U.S.C. §1334(b). The court of appeals's reference to *Brown v. Felsen*, 442 U.S. 127, 135-36 (1979), for the proposition that "Congress granted bankruptcy courts exclusive jurisdiction to determine whether a debt is dischargeable," 184 F.3d at 1284, was misguided. *Brown v. Felsen* was decided under the now-repealed Bankruptcy Act of 1898. Under §1334(b) of the present Bankruptcy Code, effective in 1978, jurisdiction over dischargeability suits such as the one in this case is concurrent between federal and state courts.

---

2. Under 11 U.S.C. §523(a)(8), debtors may be able to discharge student loan obligations if they are able to show that repayment will constitute an "undue hardship."

Although the great majority of dischargeability suits are undoubtedly determined in federal bankruptcy courts, state courts can and do exercise their concurrent jurisdiction to make dischargeability determinations, including the dischargeability of student loans. *See, e.g., Vermont Student Assistance Corp. v. Zeichner*, 708 A.2d 1351 (Vt. 1998) (determining student loan of ex-bankruptcy debtor to be nondischargeable); *Massachusetts Higher Educ. Assistance Corp. v. Taylor*, 459 N.E.2d 807 (Mass. 1984) (same); *New York State Higher Educ. Services Corp. v. Kaplan*, 684 N.Y.S. 2d 356 (N.Y. App. Div. 1999). State court suits determining dischargeability under other subsections of 11 U.S.C. §523(a) are also fairly common. *See, e.g., Schatz v. Franchise Tax Board*, 81 Cal. Rptr. 2d 719 (Cal. App. 1999) (tax debt nondischargeable); *Tucker v. Louisiana Dep't of Revenue & Taxation*, 708 So. 2d 782 (La. App. 1998) (same); *Stepp v. Stepp*, 955 P.2d 722 (Okla. 1998) (support alimony not dischargeable); *Macy v. Macy*, 714 P.2d 744 (Wyo. 1986) (child support obligations not dischargeable).

In summary, Congress by statute has neither provided for any type of waiver of Eleventh Amendment immunity in the Perkins Loan Program statutes, nor provided for exclusive federal court jurisdiction over student loan dischargeability suits arising under the Bankruptcy Code. If states have waived their immunity from suits to determine the dischargeability of Perkins loans, it is not Congress that has effectuated the waiver.

## III. THE TENTH CIRCUIT'S FAULTY ANALYSIS CREATES THE POTENTIAL FOR BROAD MISAPPLICATION IN MANY IMPORTANT AREAS OF FEDERAL-STATE RELATIONS.

The court of appeals's opinion contains no reference or citation to any federal statute that arguably could provide the basis for a Spending Clause-based waiver of KSU's immunity. The court of appeals acknowledged that "this case does not present the exact language" required by Supreme Court cases to affect states' immunity, 184 F.3d at 1283, but glossed over the fact that this case does not present *any language at all* in a federal statute concerning waiver. Rather, the court of appeals created its own substitutes for clear statutory language:

(1) The court of appeals treated DOE regulations and the DOE's contract with KSU as being equivalent to a clear congressional statement in a statute; and

(2) The court of appeals improperly treated a State's acceptance of funds under Spending Clause legislation as being the same thing as filing a pleading seeking affirmative relief in a federal court.

Neither rationale survives careful analysis.

### A. "Waiver by Regulation" Is Not a Recognized Method for Accomplishing Waivers of Eleventh Amendment Immunity Without Accompanying Statutory Language.

When called upon to decide whether requisite notice has been given to a state or local government entity that engaging in certain conduct may give rise to suit in federal court, courts sometimes consider interpretive regulations

promulgated by federal executive branch agencies. But when courts have looked to agency regulations on notice issues, they have done so only when the regulations accompany statutory language that itself has been found to contain a clear indication that Congress intended to subject the governmental defendant to suit in federal court.

For example, in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), this Court took note of DOE policy guidelines regarding student-on-student sexual harassment. But the guidelines related to what this Court termed "Title IX's plain language" putting all recipients of Title IX funds on notice that they could be held liable in federal court for discrimination based on sex. The DOE guidelines, once promulgated, merely added to the statutory notice.

A number of lower courts have similarly reviewed federal agency regulations in cases involving alleged abrogations or waivers of Eleventh Amendment immunity. *Sandoval v. Hagan*, 197 F.3d 484 (CA11 1999) (Department of Justice regulations relating to Title VI of the Rehabilitation Act); *Litman v. George Mason University*, 186 F.3d 544, 553 (CA4 1999) (DOJ regulations implementing Title IX). *Amici* do not concede that those courts correctly resolved the immunity issues before them, but it is significant that the courts were addressing statutory—not regulatory—abrogations or waivers of immunity. The ultimate issue in those cases was whether a statute contained a requisite "clear statement" as to state immunity, with the regulations viewed as, at most, providing supplementary notice to the statutory language in question. Federal agency regulations, standing alone in the absence of a statute, cannot provide adequate notice to states that they

are waiving their Eleventh Amendment immunity from suit in federal court.

The Eleventh Circuit, for instance, has characterized the Court's precedents as requiring that a Spending Clause-based waiver statute "read like a prospectus and give funding recipients a clear signal of what they are buying." *Davis v. Monroe County*, 120 F.3d 1390, 1399 (CA11 1997), *rev'd on other grounds*, 526 U.S. 629 (1999). A DOJ or DOE regulation or contract that informs states of an agency's view (whether correct or incorrect) that a particular type of conduct will lead to suit in federal court only adds to the detail of the "statutory prospectus" initially provided by Congress. However, when Congress's language in a statute is ambiguous or (as in this case) non-existent with regard to abrogation or induced waiver of state immunity, an administrative agency's interpretation of the statute cannot be used to "fill in the gap" and thereby subject states to suit in federal court. *See Amos v. Maryland*, 126 F.3d 589, 606 (CA4 1997).[3]

Similarly, in *Virginia Department of Education v. Riley*, 106 F.3d 559 (CA4 1997), the Fourth Circuit was presented with an argument that if statutory provisions (of the Individuals with Disabilities Education Act) were

---

3. The Fourth Circuit's determination in *Amos* that the ADA was ambiguous with respect to its application to prisons was later reversed in light of this Court's decision in *Pennsylvania Dep't of Corrections v. Yeskey*, 254 U.S. 206 (1998). See *Amos v. Maryland Dep't of Public Safety and Correctional Services*, 178 F.3d 212 (CA4 1999). Only upon determining that an unambiguous statement was present in the statute did the Fourth Circuit agree that deference to administrative regulations was appropriate with respect to the ADA's application to state prisons.

ambiguous, the court should defer to a reasonable interpretation by a federal agency "as if we were interpreting a statute which has no implications for the balance of power between the Federal Government and the States." *Id.* at 567. The Fourth Circuit disagreed: "It is axiomatic that statutory ambiguity defeats altogether a claim . . . that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted." *Id.* If statutory ambiguity is sufficient to defeat a claim of waiver, then surely statutory silence in the Perkins Loan Program will also suffice.

*Gregory v. Ashcroft*, 501 U.S. 452 (1985), points out one of the most important reasons why courts must base Eleventh Amendment waiver findings on the presence of clear language in statutes:

> "Inasmuch as this Court in *Garcia* [*v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985)] has left primarily to the political process the protection of the States against intrusive exercises of Congress' [Article I] powers, we must be absolutely certain that Congress intended such an exercise." *Id.* at 464.

In this case, the court of appeals treated regulations promulgated by the DOE, an executive agency, and a corresponding contract with KSU as being functionally equivalent to clear provisions in a statute; but they are not equivalent because an agency acting without express congressional authorization can entirely bypass the protective "political process" described in *Gregory*. After the Court's references to the possibility of Spending Clause-based waivers in *Alden* and *College Savings Bank*, the Court will doubtless face challenges to congressional attempts to

use its Article I Spending Clause power to obtain waivers of immunity that it could not abrogate under its other Article I powers. But though Congress may attempt in the future to attempt to condition federal funding of Perkins loan program or other programs on an express waiver of Eleventh Amendment immunity, the fact remains that it has not done so. If and when it does, Senators and Representatives dependent upon state voters for their election and re-election will have to weigh the importance of their home states' interests. But the DOE is not directly answerable to any state constituency and, for that reason, DOE-promulgated regulations and contracts, standing alone, should not provide a basis to deem immunity waived where Congress has not spoken.

### B. Signing a Contract Agreeing to Comply with Agency Regulations Is Fundamentally Different From Voluntarily Filing a Pleading in Federal Court Seeking Affirmative Relief.

Just as it failed to identify any statute containing a clear statement of Congress's intent to condition state participation in the Perkins Loan Program on waiver of immunity, the court of appeals failed to identify any case law indicating that signing a contract obligating a state entity to comply with federal regulations is enough to waive immunity. Instead, the best the court of appeals could do was list a string of bankruptcy cases holding that "a state may consent to a federal court's jurisdiction through its affirmative conduct."[4] In each of the cases cited by the court

---

4. 184 F.3d at 1280 (quoting *Georgia Department of Revenue v. Burke (In re Burke)* 146 F.3d 1313, 1318 (CA11 1998), and citing *Gardner v. New Jersey*, 329 U.S. 565 (1947); *Wyoming v. Straight (In*

of appeals, the state's "affirmative conduct" was the same: filing a pleading (either a proof of claim or a pleading initiating an adversary proceeding) in bankruptcy court consenting to the court's jurisdiction.

KSU did nothing of the sort in this case. It never filed a proof of claim, and the only appearance it made in an adversary proceeding was to defend itself by asserting immunity and seeking to dismiss the suit. The court of appeals opined: "None of these cases rely on the text of a state statute or constitution to determine that the state waived immunity." 184 F.3d at 1280. That statement is unsound in two respects. First, the court of appeals inexplicably failed to focus on whether a contract agreeing to abide by agency regulations which arguably require litigation in federal court is sufficient to waive Eleventh Amendment immunity in the absence of any *federal* statutory authority. Instead, the court of appeals focused on cases in which, consistent with *state* law, the state waived immunity by filing federal court pleadings. Second, the court failed to take into account the Court's rationale in *Gardner v. New Jersey*, 329 U.S. 565 (1947), in which the Court specifically relied on the text of state statutes authorizing a state comptroller and attorney general to waive immunity by filing pleadings in federal court. *See id.* at 574-75.

When a state agency, through duly authorized officials, makes a conscious decision to file a pleading seeking affirmative relief from a federal court, it is neither surprising nor disturbing (from the agency's perspective) for the court to find that it has jurisdiction over the agency's

---

*re Straight)*, 143 F.3d 1387 (CA10 1998); *DeKalb County v. Platter (In re Platter)*, 140 F.3d 676 (CA7 1998)).

claim and any compulsory counterclaims asserted defensively against the agency. That aspect of Eleventh Amendment immunity waiver is well-settled law,[5] but it does not apply in this case, in which KSU filed no pleading and sought no affirmative relief from any federal court. No reported case prior to the court of appeals's opinion[6] supports the proposition that "affirmative conduct" in the form of a contract agreeing to comply with federal regulations—in the absence of any *federal statute* signifying Congress's intent to affect a state's immunity—will constitute a waiver. In fact, as the court of appeals acknowledged, there is case law directly to the contrary. *Florida Dep't of Health & Rehabilitation Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (state's immunity not waived by agreement to comply with agency regulations, in the absence of any clear congressional statement in a statute). The possibility that KSU *might* have waived its immunity if it had decided to seek affirmative relief from a federal court by filing a proof of claim in the Innes bankruptcy case (which KSU declined to do) does not mean that the state did waive its immunity merely by signing a contract agreeing to follow federal regulations.

The court of appeals attempted to bridge the logical gap between (a) filing pleadings seeking affirmative relief in

---

5. *United States v. Mottolo*, 605 F. Supp. 898, 910 (D. N.H. 1985) (collecting cases).

6. *Snyder v. Nebraska*, 228 B.R. 712 (Bankr. D. Neb. 1998), rejected the rationale adopted by the court of appeals. Another bankruptcy court, without citing the court of appeals's opinion, has also now held that DOE regulations require states to litigate dischargeability suits in federal court. *Muir v. Sallie Mae Servicing Corp. (In re Muir)*, 239 B.R. 213, 219-20 (Bankr. D. Mont. 1999).

federal courts and (b) contracting to follow federal regulations by construing the federal regulations here as obligating KSU to appear in federal court. Even if the court of appeals was correct, which it was not, in so construing the DOE regulations in question, it does not follow that KSU's immunity was waived. The remedy for KSU's breach of a contract to appear in federal court is not necessarily to deem KSU's immunity waived. Instead, the DOE—if it determined that KSU had such an contractual obligation and breached it, which the DOE does not appear to have done—could presumably take appropriate steps to enforce the contract, including seeking to impose appropriate penalties on KSU in an administrative proceeding, 28 U.S.C. §1094(c)(3)(B), or conditioning future participation in the Perkins program on correcting the violation. But DOE is not seeking to enforce the contract. Instead, individual Perkins loan recipients, attempting to cloak themselves in the role of third-party beneficiaries of the DOE's contract, filed a private lawsuit against KSU in federal court to remedy an alleged breach. (Again, assuming for the sake of argument that the DOE's contract required KSU to appear in federal court to defend on the merits all dischargeability suits, which the contract did not do.) The court of appeals has essentially granted to private third parties (the individual debtors in this bankruptcy case) a specific performance remedy, enforceable in federal court, with respect to KSU's contract with the DOE.

That the court of appeals would take such a step is even more surprising in view of the fact that the DOE regulations in question do not unambiguously require KSU to litigate in federal court dischargeability suits of the type brought in this case. The court of appeals identified three primary regulations that it considered to require litigation by

KSU in federal court. None of the regulations imposes any such requirement.

(1) 34 C.F.R. §674.49(a) merely restates the statutory obligation to respect the 11 U.S.C. §362(a) automatic stay by suspending non-bankruptcy collection efforts. The regulation requires no appearance in federal courts. Once the stay lifts,[7] creditors holding nondischargeable debts may proceed in state court, as a number of state student loan agencies have done.[8]

(2) 34 C.F.R. §674.49(b) requires institutions to file a proof of claim in borrowers' bankruptcies unless the borrower has no assets. The regulation makes no mention of dischargeability adversary proceedings and does not indicate that the penalty for failing to file a proof of claim is loss of immunity as opposed to simply denying recovery from the bankruptcy estate.

(3) 34 C.F.R. §674.49(c) requires institutions to follow certain procedures in bankruptcy proceedings if "properly served with a complaint" to determine dischargeability. It does not purport to determine, however, whether a complaint barred by the Eleventh Amendment is "properly served." One of the procedures to be followed is

---

7. Under 11 U.S.C. §362(c), the automatic stay terminates upon the closure or dismissal of a case, or upon the entry of a general discharge order. The stay may also be lifted for cause under 11 U.S.C. §362(d).

8. *See Vermont Student Assistance Corp. v. Zeichner*, 708 A.2d 1351 (Vt.1998); *Massachusetts Higher Educ. Assistance Corp. v. Taylor*, 459 N.E.2d 807 (Mass.1984); *New York State Higher Educ. Services Corp. v. Kaplan*, 684 N.Y.S.2d 356 (N.Y.App. Div. 1999). Each of these cases involved post-bankruptcy state court suits to collect student loan debts.

to "oppose" the request for discharge in some circumstances. It is a novel proposition indeed to suggest that exercising rights under Rule 12(b) to obtain dismissal of a suit is not "opposing" such suit. Most Rule 12(b) movants in federal court suits certainly believe they are "opposing" the suits brought against them. That is particularly so where, as here, successful opposition under a Rule 12(b) dismissal motion leaves the movant free to "oppose" dischargeability in a forum it prefers—state court.

The cited regulations are ambiguous, at best, with respect to any duty of a state institution to answer and defend on the merits a dischargeability suit in federal court. Were the regulations a part of the Perkins Loan Program statutes, they would not be sufficient to create an immunity waiver. *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) (Congress must act "unambiguously" when it intends to impose a condition on the grant of federal money). In the form of either agency regulations or a contract agreeing to abide by agency regulations, they cannot create a valid basis for waiver of Eleventh Amendment immunity.

### C. The Potential Impact of a "Waiver by Regulation" Doctrine Is Broad.

Once waiver of states' Eleventh Amendment immunity is divorced from clear statements of congressional intent in the text of statutes, the possibilities for "waiver by agency regulation" become numerous. Any federal agency given general authority to promulgate regulations and contracts governing use of federal money appropriated under the Spending Clause would be able to devise waiver provisions that would bind states accepting the money. Among the possibilities are the following:

(1) The Department of Labor, which disburses federal funds to state agencies providing unemployment benefits, could condition funding on agreements by states to comply with provisions of federal labor laws, such as the Fair Labor Standards Act. Courts have held, in the wake of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that the FLSA's abrogation of State immunity under the Commerce Clause is unconstitutional,[9] but Congress has not yet attempted to exercise whatever authority it may have under the Spending Clause to induce states to waive immunity from FLSA suits.

(2) The Environmental Protection Agency, which administers "Superfund" clean-up funds appropriated by Congress, could, by regulation and contracts with states, condition acceptance of such funds on waiver of Eleventh Amendment immunity from claims under CERCLA, 42 U.S.C. §4601 *et seq*. Under *Seminole*, attempted abrogation under CERCLA suits does not pass constitutional muster,[10] but Congress has not tried to condition Spending Clause-based Superfund appropriations on waivers of state immunity.

(3) If the federal Health and Human Services Department desires to link Medicaid funds to contractual/regulatory provisions waiving state agencies' immunity from suit in the rapidly-growing number of nursing home and hospital bankruptcies, it may presumably

---

9. *Alden v. Maine*, 119 S.Ct. 2240 (1999); *Wilson-Jones v. Caviness*, 99 F.3d 203 (CA6 1996); *Mills v. Maine*, 118 F.3d 37 (CA1 1997).

10. *Burnette v. Carothers*, 192 F.3d 52, 57 (CA2 1999).

do so under the court of appeals's rationale, regardless of whether Congress has acted in the area.

*Amici* do not concede that Congress could appropriately require waivers in any of these circumstances, even if set forth by Congress in clear language in a statute, but, at the very least, none should be valid in the absence of express congressional intent and states' informed decisions to accept funding linked to such conditions. Yet the court of appeals's finding of waiver in this case in the absence of any federal statutory provision suggests that federal agencies can accomplish just such waivers. Any protection enjoyed by states in the legislative branch political process, as envisioned by *Garcia*, evaporates under such an approach. While agency regulations may sometimes attempt to spell out what Congress intended in a Spending Clause statute, and thereby add to the degree of notice given to states accepting funds under the statute, that is not the situation in this case. Rather, this case raises the question of whether agency regulations or contracts, however ambiguous, can *create* the basis for a waiver under the Spending Clause. The importance of that question warrants granting KSU's petition in this case.

## CONCLUSION

Whether regulations or contracts drafted by a federal executive branch agency, in the absence of any explicit statement by Congress in the text of Spending Clause legislation, can create a waiver of Eleventh Amendment immunity is an issue of vital import to many states in a wide variety of areas. Granting KSU's petition for writ of certiorari in this case will provide the opportunity for valuable guidance to states and federal agencies administering funds appropriated under the Spending Clause.

Respectfully submitted.

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

LINDA S. EADS
Deputy Attorney General for Litigation

GREGORY S. COLEMAN*
Solicitor General

RONALD R. DEL VENTO
Chief, Bankruptcy & Collections Division

MARK BROWNING
Assistant Attorney General

P. O. Box 12548
Austin, Texas 78711-2548
[Tel.] (512) 936-1700
[Fax] (512) 474-2697

* *Counsel of Record*